SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

October Term, 1969

BAY SOUND TRANSPORTATION CO., et al.

v.

UNITED STATES OF AMERICA

SUPREME COURT No. 507

PETITION FOR REHEARING, REQUESTING REMAND ONLY

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Introduction. This case already is remanded (by the Fifth Circuit) to the District Court on the "multiple corporations" issue. In this petition for rehearing we request only that the depreciation issue likewise be remanded.

We ask the Court to *remand* the depreciation issue to the District Court (or, alternatively, to the Fifth Circuit) because of intervening developments—and also because the case is already remanded to the District Court on the "multiple corporations" issue.

Our Petition for Certiorari did point out (p. 9) that the Government's and the District Court's reliance on "past history" contravenes IRS policy since 1962. More importantly for present purposes is the intervening opin-

ion of the Ninth Circuit in *Western Terminal Co. v. United States,* 412 F.2d 826, which was decided in May of this year, *after* the District Court's decision herein had been reviewed by the Fifth Circuit. As pointed out in our Petition for Certiorari (p. 8), the Ninth Circuit in *Western Terminal Co.* held—and even received a letter from Government counsel to such effect—that "hindsight" is irrelevant and, at least since 1954,[1] should not be considered (as it was here) in resolving depreciation controversies.

Now, the fact that much reliance was placed on "hindsight" (and "past history", too) in the courts below in the instant case suggests, in fairness, that this Court should *remand* the *depreciation* issue to the District Court.

Since the filing of our Petition for Certiorari (about August 23, 1969), there has been a particularly noteworthy development which reflects the latest and presumably the most enlightened thinking on the subject of depreciation. The consensus of the House, the Senate Finance Committee and the Treasury Department favors depreciation of railroad cars over a period of approximately five years. Following passage by the House of Representatives of the Tax Reform Bill of 1969 (H.R. 13270), in which seven-year amortization of railroad cars was approved, the Senate Finance Committee approved a five-year amortization plan suggested by the Treasury Department. The barge industry competes with the railroad industry, and railroad cars incontestably have a much longer life than the taxpayers' hulls (as our evidence

1. The Ninth Circuit and the Government correctly concluded that using "hindsight" is inconsistent with Treas. Reg. §1.167(b)-o-(a), which was promulgated under Sec. 167 of the 1954 Code and is therefore (under accepted law) effective as of 1954.

showed—but it would be obvious anyway). Yet, for years the Revenue Service has sanctioned depreciation of railroad cars over less than fifteen years,[2] and fifteen years is the minimum period for depreciation which the courts allowed the instant case.

We submit that this recent development flags the trend and compounds the inequity of requiring fifteen- and twenty-year depreciation for the hulls here involved.

In our Petition for Certiorari we naturally omitted several important considerations in the interest of brevity. In addition to omitting any mention of the railroad industry, we also omitted the following significant matters which we now ask the Court to consider:

(1) *The shrimp-boat industry.* In 1959 the Internal Revenue Service settled with the shrimp-boat industry on an industry-wide basis as a result of a study by the IRS Valuation Analysis Branch. They agreed to a 12-year depreciation span for the shrimp-boat hulls. The life of the shrimp-boat hulls is incontestably longer than that of the hulls of the vessels involved here. This point was established by the IRS Valuation Analysis Branch Report, item (7), p. 13 (Pltfs. Ex. 2), filed in this case.

(2) *The taxpayers' industry—the petroleum barge industry.* The Mazur Report filed in this case (covering 751 Gulf Coast area vessels) and the District Court's opinion in the *Tidewater* case (68-1 USTC ¶9405) show that the hulls of oil barges and tugboats, in the vast

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2. Rev. Proc. 62-21, 1962-2 Cum. Bull. 418, Part I, deals with railroad cars in two places. Under "Group Three: Guidelines for Manufacturers," item 22 approves a depreciation span of 12 years for railroad cars. "Group Four: Guidelines for Transportation [etc.]" approves a depreciation span of 14 years for railroad cars, under item 9(a) (Railroads—Machinery and equipment).

majority of cases industry-wide, are depreciated by their owners over periods of ten years or less—with Revenue Service approval, as evidenced by the District Court's opinion in *Tidewater*.

New Alternative Argument. We ask the Court to consider the following new, alternative argument: The law should not be (and we submit is not) that depreciation necessarily is unreasonable solely because it be taken over a period of time that is probably shorter than the actual period that a property will be in use. For the question is simply one of *reasonableness* (under the statute); and there are factors other than merely length of time which are to be considered in determining the reasonableness of any rate of depreciation.

Although this is a new argument in this lawsuit, it is sound in principle and finds support in the only article we have found dealing directly with the subject of reasonableness as the basis for depreciation, written 38 years ago. Rolnick, "Reasonableness, The Basis for Depreciation," 9 The Tax Magazine [Taxes] 95 (March 1931). There it is stated (p. 95):

> [T]he only rule * * * is that the annual deduction for depreciation must be "reasonable."

"[R]easonableness in practice is, often, merely rough agreement with the policy of others operating the same kinds of assets under more or less similar conditions." *Ibid.* (Note the discrimination against the taxpayers in the present case.)

The future is unpredictable and unforeseeable. A reasonable allowance for depreciation would require (in addition to allowing for obsolescence and wear and tear)

allowing for "inadequacy" due to unforeseeable "changed demands" of the market or to other causes. *Ibid.* Because it is based on what is reasonable, the law of depreciation permits "an allowance for future contingencies," even though not measurable at all. Rolnick, *supra,* pp. 95-96. The times are rapidly changing, and the future cannot be determined, reliably, on the basis of the past. Indeed, the chief error in determining the future life of an asset is doing so "on the basis of the ages of similar items still in use." *Id.* at 96. Therefore, reasonableness requires that a businessman be allowed a safety factor in determining his rate of depreciation; and "[E]stimates of probable life of a long-lived asset should lean heavily in favor of the taxpayer." *Ibid.* The concept of reasonableness thus is broader than a mere slavish adherence to the presently foreseeable duration of productive life.

Depreciation is much too important an issue to have received such little attention from the Court in the past several decades and particularly in this post-World War II era of proliferating technological development and rapid change.

CONCLUSION

This case already is remanded (by the Fifth Circuit) to the District Court on the "multiple corporations" issue. We respectfully ask the Court to remand the depreciation issue, also, to the District Court (or alternatively to the Fifth Circuit). Such court should be directed to consider, on remand, the Government's concession in the *Western Terminal Co.* case (May 29, 1969) that "hindsight" is irrelevant and should not be used (as it was here) in resolving depreciation controversies. The District Court

should be allowed to take into account the recent Congressional and Treasury actions which reflect national policy and presumably more enlightened thinking in approving amortization of railroad cars (which are undoubtedly longer-lived than the hulls in question) over a period of only 5 years.

These important developments occurred after the decisions of the courts below. We request merely that the case be remanded for consideration thereof, and such other matters as the Court may deem appropriate.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I hereby certify that this Petition for Rehearing is presented in good faith and not for delay, and is restricted to grounds which are confined to intervening circumstances of substantial or controlling effect, and to other substantial grounds available to petitioners although not previously presented, in accordance with Supreme Court Rule 58, Paragraph 2.

JOHN A. BAILEY

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Petition for Rehearing have been served on the United States by air-mailing, with postage prepaid, on this the _____ day of December, 1969, the same to the following:

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